No. 12795

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALI RASCHID, named in the indictment as Rudolph LaMarr,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

HONORABLE JOHN C. BOWEN, *Judge*

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
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STATEMENT OF THE CASE

Appellant, indicted by the grand jury as Rudolph LaMarr, for violation of the White Slave Traffic Act (Title 18, Sections 2423 and 2422), after a plea of not guilty to the two counts in the indictment, was tried and convicted on both counts and sentenced to five years' imprisonment and a $1000.00 fine on Count I and five years' imprisonment on

Count II, to run concurrently with the sentence imposed on Count I.

The first count, in substance was that he did knowingly, and unlawfully, persuade, induce and entice one Enola McMath, a female, who had not attained her eighteenth birthday, to go by common carrier from Seattle, Washington, to Portland, Oregon, with intent on the part of appellant that the said Enola McMath be induced to engage in prostitution and debauchery.

The second count, in substance charges that appellant did knowingly and unlawfully persuade, induce and entice Beverly June Allen, a female person, to go from Seattle, Washington, to Portland, Oregon, with the intent on the part of appellant that the said Beverly June Allen should engage in the practice of prostitution and debauchery, and that appellant did thereby knowingly cause the said Beverly June Allen to go and to be transported as a passenger upon the line and route of a common carrier in interstate commerce from Seattle, Washington, to Portland, Oregon.

To this indictment, appellant pleaded not guilty and upon a trial before a jury he was found guilty on both counts.

Judgment and sentence was passed to October 30, 1950.

At the trial, the only evidence offered was on behalf of the Government, which consisted of the testimony of the two victims involved and two hotel operators at Portland, Oregon, where the two victims registered.

Appellant offered no evidence whatsoever, nor did he take the stand in his own defense. At the close of the Government's case, appellant interposed a motion challenging the sufficiency of the evidence, which was denied. (R. 11) Appellant offering no evidence, renewed his motion for a directed verdict of not guilty, which was likewise denied. (R. 11)

After the return of the verdict of the jury, appellant filed a written motion for acquittal and in the alternative for a new trial. (R. 11) This motion was likewise denied and October 30, 1950, judgment and sentence was imposed. (R. 15)

At the trial, appellant was represented by Will G. Beardslee, who, after the court had fixed bail at $10,000.00 pending appeal, withdrew November 3, 1950, after giving written notice of appeal. (R. 17-19) The next day, November 4, 1950, J. Kalina, Esq., entered his appearance as attorney for appellant.

(R. 18) Los Angeles counsel appear in this court with J. Kalina, of Seattle, of counsel.

Appellant thereafter and on November 4, 1950, filed his appeal bond in the penal sum of $10,000.00 with General Casualty Company of America as surety. (R. 19-20) A motion supported by the affidavit of appellant was filed seeking permission to leave the jurisdiction of the District Court, which was denied. (R. 22) Appellant, nevertheless did leave the jurisdiction, was apprehended in San Francisco, California, and returned to Seattle at the expense of his bondsman.

On December 22, 1950, the District Court made and entered the following order:

> "This cause having this day come on regularly for hearing in open court pursuant to due notice to defendant, upon the Court's previous oral order requiring defendant to show cause if any there be why his supersedeas bond on appeal should not be revoked and why defendant should not be remanded to the Marshal's custody without bond pending his appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit and why he should not be adjudged in contempt of this Court because he had left the jurisdiction of this court and had gone to San Francisco, contrary to the Court's order and the conditions of his bond. And this cause having also come on for hearing upon defendant's own motion that he be remanded to the Marshal and be allowed credit on his sentence for the time spent in the Marshal's custody, and at McNeil

Island, and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal.

"And the Court being of the opinion and finding and deciding that no reason has been shown why defendant's said appeal bond should not be revoked nor why defendant should not be remand to the Marshal's custody pending defendant's appeal, and that defendant has wrongfully departed the Court's jurisdiction and has gone to San Francisco for an unlawful purpose contrary to the Court's order and contrary to the conditions of said appeal bond,

"Now, therefore, it is hereby

Ordered, Adjudged and Decreed that the defendant's supersedeas appeal bond and the previous order of the court admitting defendant to bond or bail pending his appeal be, and are hereby, revoked and defendant is hereby remanded to the Marshal's custody without bond, pending defendant's appeal; and it is further

"Ordered, Adjudged and Decreed that defendant's motion that he be remanded to the Marshal's custody and be sent to McNeil Island pending his appeal and be allowed credit on his sentence for the time hereafter spent in the Marshal's custody and at McNeil Island, and that his supersedeas appeal bond be surrendered and the surety thereon be discharged and exonerated, without prejudice to his appeal, be and is hereby granted and pursuant to his said motion, defendant is hereby remanded to the Marshal's custody and defendant's said appeal bond is surrendered and the surety thereon is discharged and exonerated, without prejudice to his appeal, and upon defendant's request the Marshal may transfer defendant to McNeil Island Penitentiary forth-

with. It is further ordered that the show cause order previously orally made by the Court requiring defendant to show cause why he should not be adjudged in contempt of this Court be and is vacated and the rule thereunder discharged.

DONE IN OPEN COURT this 22d day of December, 1950.

JOHN C. BOWEN
U. S. District Judge" (R. 123-5)

THE EVIDENCE

The two victims, their mother and two hotel proprietors from Portland, Oregon, constituted all of the witnesses in the case.

Defendant did not take the stand in his own defense, neither did he offer any other witnesses. (R. 76)

The testimony of the two victims is short and concise and was sufficient, we claim to go to the jury.

It shows that the defendant, at Seattle, suggested to the victim in Count II that she would profit by engaging in prostitution; that with this in mind he paid her transportation and that of her sixteen-year-old sister to Portland; that he accompanied them to Portland and before leaving Seattle suggested the hotel at which they should stay.

The intent of the defendant is gathered from what he said and did.

At Portland he again propositioned the victim to engage in prostitution and debauched the younger one. This evidence is all set out in appellant's brief and it is needless to here repeat it.

ARGUMENT

INSUFFICIENCY OF THE EVIDENCE

The claim of insufficiency of the evidence to submit to the jury so elaborately argued by Los Angeles counsel who did not participate in the trial borders on the ridiculous, when it is considered that they have gone to great length in setting out part only of that evidence in their brief (eliminating, of course, what follows).

They say, for instance, that support for the verdict on Count I must be found in the testimony of Enola McMath herself, who they say positively testified that appellant never mentioned prostitution to her either in Seattle or Portland. So far as it goes, that statement concerning prostitution is correct, but the indictment charges not only inducement to engage in prostitution, but "debauchery" as well. Can it be said by any fair-minded person that under this girl's testimony, that appellant did not "debauch" her?

The testimony of this victim was that she first

met appellant at the Sessions Club in Seattle in May, 1950. (R. 30) That "it was weeks or so later my sister and I were at the Elks Club." "He had called us on the phone and said he wanted to talk to us and so we both went down, and it was then that he brought up the subject of going to Portland * * *." (R. 31)

Q. Then what followed?

A. Well, then after we decided to go, he told us to meet him the next day and that he would give us the money for the train fare, for the tickets. (R. 31)

Q. Did he give you the money for train fare?

A. Yes. (R. 32)

Q. Where?

A. It was in the train depot.

Q. What did you do with that money?

A. I took the money and bought Beverly and myself two tickets round trip, and then when I arrived in Portland, used the other part of the money for our hotel. (R. 32)

Q. What, if anything was said to you by the defendant at the station or at any other time as to where you should go or what you should do at Portland?

A. Before we left, he had told us that *after we had registered at the hotel, to call him.* (R. 32).

Q. What hotel? Did he suggest the name of the hotel?

A. He had given us, I believe it was two hotels to choose from. The Carroll was one and I don't remember the other, and we chose the Carroll. (R. 32)

Then follows what we claim definitely shows the intent of appellant so far as this victim is concerned, which intent, any reasonable minded person would conclude was formed in Seattle long prior to the interstate journey to Portland.

In the victim's explanation of her sexual relations with appellant at Portland, we find this in the record at pages 37-38:

The Witness: Well, the reason for having sexual intercourse was before I had gone to Portland that I didn't mention was that —

The Court: Never mind that. Do not state that. That is not the question. Read the question.

(The question referred to is contained at p. 36 of the record and was: Q. What were the circumstances under which you had sexual relations?)

The Court: Answer that and nothing else.

The Witness: I was afraid.

Q. Why? Was it something that he said?

A. Well, he had said something before that.

Q. What was it he said? (R. 37)

A. That is what I started to say *before the time*

> *that I had left* Seattle, he had called the house and wanted to see me. He said that he would come down to work and pick me up, that he wanted to talk to me, and I said no, that I didn't want to see him. He said that if I had any plans to see anyone else or had made plans, just to forget about them, and *if I didn't see him he would come in and make a scene and drag me out of there.* He didn't mean bodily, I don't imagine, but I thought he would create a scene, so I didn't go to work that day. (R. 38)

The jury had the right to believe from this testimony that it was then that the appellant formed the intent to debauch this young girl. It was certainly a circumstance in the light of the accomplishment of that purpose at Portland.

We contend that far from being insufficient, it was conclusive, when corroborated, as it was, by the testimony of the hotel proprietor, Mrs. Carrie L. Ruthman, (R. 70) who testified that the girls registered at her hotel (R. 26) and who attributed to appellant the statement that "he was a friend of their mother, of the young girl's mother, and she was very anxious about her and *had sent him to Portland to find them and bring them home.*" (R. 70)

The mother of these victims was called on behalf of the Government (Mrs. Rose Ferguson (R. 71). She testified to the dates of the birth of her two daughters. She was asked if she was acquainted

with appellant and her answer was, "No, I have never seen the party, but I have talked with him over the telephone."

Q. What was the talk that he had with you?

A. He wanted to know where the girls were, and he was anxious to get hold of a suitcase that the girls had borrowed.

Q. Did you ever meet him at any time?

A. No. I did not. (R. 72)

On cross-examination by Mr. Beardslee, the following is shown by the record: (R. 72)

Q. Did you ever call the defendant in Portland to ask him about your girls, where they were?

A. No. I called Portland, the Carroll Hotel, to find out about the girls, and Mr. LaMarr had called me after that, wanting to know where the girls were. I did not call him but he had called me. I also called Portland myself, but the girls were not at the Carroll Hotel, and that is when I was beginning to worry. (R. 73)

As the record at this point stands, it clearly shows that the appellant lied to the proprietor of the Carroll Hotel when he said the mother of these two young girls had sent him to Portland to find her daughters, which is just another circumstance the jury were entitled to consider in making up their verdict.

On the second count, we have the undenied testimony of the victim that appellant solicited her in Seattle to engage in prostitution, and again in Portland, Oregon.

The fact that appellant did not accomplish his purpose is entirely beside the point.

Qualls v. United States, 149 F. (2d) 891.

The jury had the right to consider all of the surrounding circumstances and it is idle to argue that the Government must produce a photographic copy of appellant's mind to show his intent. Intent is usually determined by circumstances coupled with actions, and the jury in this case apparently added facts to circumstances as disclosed by the evidence and reached the conclusion that the facts and circumstances proved to their satisfaction beyond a reasonable doubt that defendant was guilty as charged in both counts.

ALLEGED INADMISSIBLE EVIDENCE

The argument of counsel on this question is so palpably without merit that it is not worthy of notice.

ALLEGED MISCONDUCT OF GOVERNMENT COUNSEL

Grasping at straws in their desperate effort to

this appellant, the old trick of claiming error prejudicial to appellant is here reflected again.

Apparently able counsel representing appellant at the trial, at the time of the argument of Government counsel, could discern nothing to complain about. No objection was at any time made to what was said in either opening or closing argument, and such assignment comes too late.

Contrary to showing "zeal" for the purpose of securing a conviction, as Los Angeles counsel characterize it, we believe Government counsel's argument was well within the limits set forth in the *Lefkowitz* case cited by counsel.

Certainly comment on the part of Government counsel was invited by Mr. Beardslee's argument to the jury, Los Angeles counsel's statement at p. 24 of their brief to the contrary notwithstanding.

All of the authorities cited by Los Angeles counsel for appellant state the law as applied to the situations there involved, but the facts in those cases are wholly dissimilar to the facts and circumstances as disclosed by the record in this case.

At the outset, and since appellant's present counsel say, at p. 16 of their brief, in connection with the claim of prejudice to appellant in the argument of

counsel for the Government (to which no exception was taken at the time):

> "*The record does not disclose it, but appellant here is a negro.* The complaining witnesses were white persons. All of us are aware of the deep seated prejudices that lurk beneath the surface where interracial sexual relations are involved, particularly between negro males and white females." (Italics ours).

On the voir dire examination of the jury, this precise question was propounded to each juror separately *at the urgent request of Mr. Will Beardslee, appellant's trial counsel*, who later withdrew. (R. 18) We trust we too may be excused for going outside the record.

The question which the Court asked the jurors as a whole, as framed by Mr. Beardslee was in effect: "*Does any juror now in the jury box entertain any bias or prejudice against the defendant solely because he is a negro and two white girls are involved?*" Those entertaining such prejudice were requested to so indicate by raising their hands. Five such jurors raised their hands and were promptly excused for bias and their places were filled by five other jurors to whom a similar question was propounded and all twelve jurors, and the thirteenth alternate juror, each for himself and herself (the jury consisted of nine men and three women) swore that they entertained no

such prejudice and could give this negro just as fair a trial as if he were a white man.

Instead of Government counsel having inflamed the minds of the jurors, as argued by present counsel, where they say (Br. 16):

> "The District Attorney lost no time in seeking to have the complaining witness identify the Club where the parties met as a colored club. (R. 30). He moved quickly to ask a leading question as to another club, 'It is the colored Elks Club'?" (R. 31)

The actual record reads:

Q. What kind of a club is it?

A. It is a colored club. (R. 30)

As to the colored Elks Club testimony, we also quote the record verbatim.

Q. Did you meet him at some subsequent date?

A. Several. Well, it was weeks or so later that my sister and I were up at the Elks Club and it was then that —

Q. You say the Elks Club? Is that the Elks Club down here on —

A. Jackson.

Q. It is the colored Elks Club?

A. Yes.

The Court: Ask the witness Mr. Belcher.

The Witness: It was the colored Elks Club on Jackson Street.

Q. What was the occasion of your going down there?

A. Well, he had called us on the phone and said he wanted to talk to us and so we both went down, and it was then he brought the subject up of going to Portland. I was working at the time. I was working, that was it, and I was planning on changing my job and he had said there were more opportunities for work down there. (R. 30-31)

To all of which no objection was made.

The inquiry was pertinent and the answers direct and the whole matter was far from being an attempt to in anywise prejudice or influence the jury on a racial issue which the jurors solemnly swore would not in any event influence their verdict. The racial question had already been overly emphasized by Mr. Beardslee, trial counsel for appellant, and present counsel are not in any position to complain of a matter injected into the case by their predecessor.

Again counsel quote from a very small part of the argument of Government counsel in addressing the jury (Br. 16) where they say: "In his argument to the jury, the District Attorney remarked 'no man, white or black, is giving a woman $105'." (R. 100)

In fairness, we believe what preceded and followed those quoted words should be mentioned. To again quote the record:

The Court: We will hear the Government's closing argument.

Mr. Belcher: If your honor please, it is not a question, as counsel suggested to you, as to who sought who in this case. These girls are not on trial. What may have been their intention is an entirely different thing than what was the intention of the defendant with his philanthropy. It stands to reason that no man, white or black, is giving a woman $105 — that is what it was, $35 and $70 — unless he expects something in return.

It requires a rather biased mind to conclude, as do present counsel for appellant, that what was said by Government counsel in addressing the jury was intended to create racial prejudice and thus influence a jury whose membership constituted those on whose minds it had been so indelibly impressed by the then counsel for appellant that the defendant was a negro and the two victims were white girls, and each of which juror solemnly swore he or she entertained no prejudice against defendant on account of his color.

Again may we point to the argument of appellant's counsel to the jury at the trial, which invited these remarks by Government counsel. Mr. Beardslee, as appears in the record at p. 90, in addressing the jury said:

"The principal thing that worries me in this case is that I cannot help but feel that there may

be some latent prejudice against a colored man associating with white women, and by that I don't mean prejudice on its face, but it may be something latent that you are not conscious of until the actual facts are presented to you.

"With respect to that, I hope you will all consider who sought who in this case. The defendant *Rudy LaMarr was at a negro night club where negroes gather.* These girls, first the older one, came into the club, was introduced to him. She said she was with a party of other people * * *."

Can it be said to be error for Government counsel to have said in reply:

"It stands to reason that no man, white or black, is going to give a woman $105. * * * unless he expects something in return."

when the matter of defendant's color and that two white girls were involved was so paraded before the jury by appellant's own counsel?

It will be noted that at no time during the argument of Government counsel either in opening or closing did counsel for appellant raise any question as to the conduct of Government counsel.

After the Court had instructed the jury, this occurred: (R. 119)

The Court: Counsel have I overlooked anything?

Mr. Belcher: None, so far as the Government is concerned, your honor.

Mr. Gemmill: Defendant has no exceptions.

It appears in the record at p. 11, after the receipt and filing of the verdict of the jury, that is two days thereafter (October 20, 1950), appellant through his attorney Will G. Beardslee, filed in the District Court a paper denominated "motion for acquittal and in the alternative for a new trial", where for the first time, in that part of the alternative motion it is stated:

> "4. The defendant was substantially prejudiced and deprived of a fair trial by reason of the fact that the attorney for the Government, in his argument to the jury, called the jury's attention that the defendant had not taken the stand in his own behalf by stating that certain evidence introduced by the Government had not been denied *by the said defendant.*"

This, of course, came too late, even if meritorious.

The record is absolutely barren of any reference by Government counsel to the fact that the defendant had not testified in his own defense.

The rule announced in *Lefkowitz v. United States*, 273 Fed. 664, is:

> " * * * and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell.

We perceive nothing objectionable on the part of the prosecution."

Los Angeles counsel for appellant concede in their brief (p. 24):

"And where comment is invited by the statement of defendant's counsel, comment may be made by Government counsel."

Again Los Angeles counsel for appellant are wrong when they say (Br. p. 24):

"There can be no claim in this case that appellant's counsel invited comment by his statement. He made none."

In this connection it is only necessary to read the quoted argument of Mr. Beardslee set out at pages 17 and 18 hereof.

CONCLUSION

Dealing first with the question of the sufficiency of the evidence, this Court has said in *Womble v. United States*, 146 F. (2d) 263:

"On the question of the sufficiency of the evidence, this Court can inquire only as to whether there is substantial evidence to support the findings. * * * The appellant contends that there was no evidence that in transporting Dewel Kathleen Womble he had any intent that she should practice prostitution. *The law is settled that in prosecutions for violation of the White Slave Act*, Title 18, U.S.C.A., Sec. 398, *the jury or Court may infer intent from all the circum-*

stances of the evidence. Tedesco v. United States, 9 Cir. 118 F. (2d) 737, 741, *Shama v. United States*, 8 Cir. 94 F. (2d) 1. This Court has decided the evidence of conduct at the end of the journey is sufficient to sustain such a conviction. *Kelly v. United States*, 9 Cir. 297 F. 212.

"* * * It is our opinion that all this evidence is substantial and supports the lower court's judgment." (Italics ours)

The evidence we have here set out, we claim is also substantial and supports the lower court's judgment.

On the question of the admission of evidence claimed prejudicial, it is a little difficult to understand where there could be the slightest error in having one of the victims testify to a conversation with the appellant shortly prior to the trial concerning the prospective trial and since Los Angeles counsel do not elucidate, we pass the matter without further comment.

Concerning the alleged misconduct of Government counsel in his argument to the jury, we feel we have fully covered that phase.

Los Angeles counsel have gone far afield in citing *Harrison v. Hoff* (should be *Hansen v. Haff)*, 291 U. S. 559, 563. That was a deportation case where the statute involved prohibited the entry into the United States of "prostitutes or persons coming

into the United States for the purpose of prostitution or for any other immoral purpose."

We believe had counsel taken the time to read the case, instead of lifting out of it a certain quoted portion, they would have found that what the Court there was considering was the "intent" of the *female* involved and *not the intent of the male*, as here.

In the case at bar, the intent of the females involved has no bearing on the case.

The case of *Cleveland v. United States*, 329 U. S. 14, definitely settles these principals:

1. The act is not limited to commercialized vice. Citing *Caminetti v. United States*, 242 U. S. 470, which originated in this Circuit.

2. It expressly applies to transportation for purposes of debauchery which may be motivated solely by lust.

3. Guilt under the Act, turns on the purpose which motivates the transportation, not on its accomplishment.

Under the first count, appellant accomplished his purpose by having the sexual relations at Portland, for which he laid his plans in Seattle, when he first formed his intent.

Under the second count, although forming the intent at Seattle, as disclosed by his suggesting pros-

titution to the victim prior to the commencement of the interstate journey, and renewing that suggestion after the interstate journey had ended, but which was not accomplished, so that, under the rules announced by the United States Supreme Court and adhered to in this Circuit, we respectfully submit there was no error committed in this case and the judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney